

231544

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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CARGILL, INCORPORATED	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42120
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	

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**CARGILL INCORPORATED'S REPLY IN OPPOSITION TO BNSF RAILWAY  
COMPANY'S PETITION FOR ORDER DIRECTING SIMULTANEOUS FINAL  
BRIEFS ON LIABILITY ISSUES**

Cargill, Incorporated ("Cargill") opposes the above-referenced Petition which BNSF Railway Company ("BNSF") filed on December 13, 2011, and in support hereof states as follows:

(1) Phase I of this case (Liability) is being litigated under the procedural schedule adopted by the Board. The schedule called for Cargill to submit opening evidence and argument; BNSF to submit reply evidence and argument; and Cargill to submit rebuttal evidence and argument. The schedule does not call for briefs, and the last submission under the schedule – Cargill's rebuttal – was filed on November 23, 2011.

(2) BNSF claims that briefing is necessary because "[t]his is a case of first impression that raises multiple issues for resolution by the Board." Petition at 1. In fact, this case involves a single discrete issue – whether BNSF's assailed fuel surcharge practices are unlawful – and the Board established the legal standards governing resolution of this issue in its

decision served in this case on January 4, 2011. Since that time, the parties have submitted responsive evidence and argument. There is no reason for any additional briefing.

(3) BNSF claims that its briefing request is supported by several decisions where briefing was ordered years ago by the Board (or its predecessor) in stand-alone cost (“SAC”) cases.<sup>1</sup> These decisions are clearly inapposite here:

- Briefs are useful in SAC cases because there are hundreds of individual issues, and “complex” evidentiary records.<sup>2</sup> Indeed one of the principal purposes of briefs in SAC cases is to assist the Board in simply finding supporting evidence in the parties’ evidentiary submissions and workpapers.<sup>3</sup> In contrast, the instant case does not involve complex SAC issues, the record is simple compared to a record in a SAC case, and the parties’ supporting evidence is readily accessible.

- Due to SAC case complexities, both shippers and carriers usually favor briefs. In all of the SAC cases cited by BNSF, except two, briefs were either sought by each side or were unopposed,<sup>4</sup> and in the two contested cases, the Board ordered briefs to “summarize the

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<sup>1</sup> *Pub. Serv. of Colo. d/b/a Xcel Energy v. Burlington N. and Santa Fe Ry.*, STB Docket No. 42057 (STB served Aug 8, 2003) (“*Xcel*”); *Duke Energy Corp. v. Norfolk S. Ry.*, *Duke Energy Corp. v. CSX Transp., Inc.*, *Carolina Power & Light Co. v. Norfolk S. Ry.*, STB Docket Nos. 42069, 42070, 42072 (STB served Dec. 13, 2002) (“*Eastern Cases*”); *Tex. Mun. Power Agency v. Burlington N. and Santa Fe Ry.*, STB Docket No. 42056 (STB served May 28, 2002) (“*TMPA*”); *PPL Mont., LLC v. Burlington N. and Santa Fe Ry.*, STB Docket No. 42054 (STB served Dec. 12, 2001) (“*PPL*”); *Wisc. Power & Light Co. v. Union Pac. R.R.*, STB Docket No. 42051 (STB served Nov. 15, 2000) (“*WPL*”); *FMC Wyo. Corp. v. Union Pac. R.R.*, STB Docket No. 41989 (STB served July 2, 1999) (“*FMC*”); *Potomac Elec. Power Co. v. CSX Transp., Inc.*, ICC Docket No. 41989 (STB served Nov. 24, 1997) (“*PEPCO*”); and *West Tex. Utils. Co. v. Burlington N. R.R.*, ICC Docket No. 41191 (ICC served Sept. 8, 1995) (“*WTU*”).

<sup>2</sup> See, e.g., *Xcel* at 1; *Eastern Cases* at 2; *TMPA* at 1; *PPL* at 2.

<sup>3</sup> See, e.g., *TMPA* at 1-2 (directing parties to “point out where in the record . . . [listed] evidence may be found”); *Xcel* at 1-2 (same); *FMC* at 2 (same).

<sup>4</sup> See *Xcel* at 1 (both parties seek briefs); *Eastern Cases* at 1 (same); *TMPA* at 1 (same); *PPL* at 1 (carrier’s request for briefs not opposed); *FMC* at 2 (carrier files briefing motion and

evidence.”<sup>5</sup> Both Cargill and BNSF have already provided the Board detailed summaries of their evidence,<sup>6</sup> so there is no need for additional briefing to provide the same summaries again.

- The Board has made it very clear in its SAC briefing orders “that new evidence or argument is not permitted in briefs.” *WPL* at 2. BNSF’s Petition says that BNSF does not intend to introduce “new evidence,” (*id.* at 1) but its Petition ignores the prohibition against presenting new “argument[s].” BNSF’s introduction of new arguments in its brief would be impermissible under the SAC cases it cites, and is fundamentally unfair to Cargill, the party that bears the burden of proof in this case.

(4) BNSF claims that the briefing it requests – simultaneous briefs not to exceed 30 pages to be filed 30 days after the Board issues a briefing order – “will not result in unnecessary delay in the resolution of this matter.” Petition at 3. In fact, the exact opposite is true. Cargill filed its Complaint on April 19, 2010, and more than one and one-half years later, Phase I became finally ripe for decision on November 23, 2011. BNSF’s briefing schedule will needlessly slow-down already delayed resolution of this case by at least 60 days or more, and unnecessarily increase the parties’ litigation costs.

(5) If the Board believes additional input from the parties would be of assistance to it, Cargill requests that the Board identify the particular areas where it seeks additional party input and establish an expedited briefing schedule calling for the simultaneous filing of briefs, not to exceed 15 pages, to be made within 15 days of the Board’s order.

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shipper “does not oppose narrowly focused briefs responsive to specific requests by the Board”); *PEPCO* at 8 (carrier asks for briefs and shipper, while maintaining “briefs are unnecessary . . . does not oppose a briefing schedule”).

<sup>5</sup> *WPL* at 2; *WTU* at 2.

<sup>6</sup> See Cargill Opening Statement at 17-41 (filed Aug. 25, 2011); BNSF Reply Evidence and Argument at 11-15, 31-73 (filed Oct. 24, 2011); Cargill Rebuttal Statement at 6-58 (filed Nov. 23, 2011).

Respectfully submitted,

CARGILL, INCORPORATED

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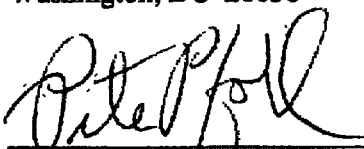
Dated: December 21, 2011

Attorneys for Complainant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of December, 2011, I caused copies of the foregoing to be served by hand on counsel for Defendant BNSF Railway Company, as follows:

Samuel M. Sipe, Jr.  
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